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No. 07-1213

IN THE
Supreme Court of the United States

COMMONWEALTH OF KENTUCKY,
Petitioner,

v.

JAMES HOWELL LEACH and
KAREN ELAINE LEACH,
Respondents.

On Petition for a Writ of Certiorari to the
Kentucky Court of Appeals

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was James and Karen Leach's back door impliedly open to the public?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

A. Factual Background 1

B. Proceedings Below 3

C. Respondents Object to Question Presented 6

REASONS FOR DENYING THE WRIT 7

A. The Purported Conflict Does Not Exist. 7

B. Even if It Did Exist, the Conflict Would Not Be Implicated By This Case 11

CONCLUSION 13

APPENDIX ..... A1 – A5
Photos of Leach home at 2215 West Hovecamp Road, Paducah, Kentucky

TABLE OF AUTHORITIES

CASES Pages

Alvarez v. Montgomery County,
147 F.3d 354 (4th Cir. 1998) 7

City of Eugene v. Silva,
108 P.3d 23 (Or. App. 2005) 8, 9

Cloar v. Commonwealth,
679 S.W.2d 827 (Ky. App. 1984) 4

Estate of Smith v. Marasco,
318 F.3d 497 (3d Cir. 2003) 7, 8

Gonzalez v. State,
588 S.W.2d 355 (Tex. Crim. App. 1979) 8

Miller v. State,
27 S.W.3d 427 (Ark. 2000) 8

State v. Fisher,
154 P.3d 455 (Kan. 2007) 8

State v. Lyons,
307 S.E 2d 285 (Ga. App. 1983) 8

Trimble v. State,
842 N.E.2d 798 (Ind. 2006) 9

United States v. Daoust,

916 F.2d 757 (1st Cir. 1990).....7, 8

U.S. v. Dunn,
480 U.S. 294 (1987). 6
United States v. Freeman,
426 F.2d 1351 (9th Cir. 1970) 7, 9

United States v. Hammett,
236 F.3d 1054 (9th Cir. 2001), ...7, 8

United States v. James,
40 F.3d 850 (7th Cir. 1994), ...*passim*

United States v. Raines,
243 F.3d 419 (8th Cir. 2001) 7, 8

United States v. Reed,
733 F.2d 492 (8th Cir. 1994), ...7

OTHER AUTHORITIES

Fourth Amendment to the United States Constitution. 11

RULE

Supreme Court Rule 10..... I

The fact-specific question of whether the Leach back door was impliedly open to the public is not worthy of this Court's review. Even if Petitioner's view of the case were correct, the case would involve only "the misapplication of a properly stated rule of law." *See* S. Ct. R. 10. In any event, the lower court was correct in deciding that the back yard was not impliedly open as photos in the appendix clearly show.

Attempting to make this case sound as though it involves more than the application of the law to the facts, Petitioner claims that there is "ambiguity" in the law over whether police officers must always try the front door of a house before proceeding to the back yard or whether they can approach any area generally open to visitors. Pet. 15. But neither the court below nor *any other case* cited by Petitioner states that police officers must always knock on the front door before trying the back. The conflict claimed by Petitioner does not exist and, even if it did, it would not be presented by this case. The petition for a writ of certiorari should be denied.

The court below held that police officers, in furtherance of a legitimate investigation, can enter parts of private property that are impliedly open to the public. Petitioner appears to agree with that legal standard. *See* Pet. 12 ("[W]hen officers are approaching a residence for a legitimate purpose, it is reasonable for the officers to enter those areas of the curtilage which are impliedly open to the public."). Nonetheless, it disagrees with the court below about whether it was reasonable for the officers in this case to enter James and Karen Leach's backyard.

If this court grants certiarori the entire argument will be whether James and Karen Leach had a back

door which was impliedly open to the public. Based on the evidence here (see Statement of the Case and photos in appendix), this Court's answer will be the same as that of the Kentucky Court of Appeals: No.

STATEMENT OF THE CASE

A. Factual Background

On April 15, 2005 and again on April 16, some unknown person called the West Kentucky Crimestoppers' in McCracken County and gave two tips that would turn out to be largely false. The first tip was that the residents of 2215 West Hovecamp Road, In Paducah, were dealing cocaine and marijuana. The second tip added that they were dealing methamphetamine. There had been no reason to suspect illegal activity at this address and no prior investigation. In the end it would turn out that no one at 2215 Hovecamp was dealing or using cocaine or methamphetamine. Like many Kentucky citizens, Karen and James Leach kept guns in their home. The only illegal substance found was marijuana.

This was not an emergency. It was not until about a week after the Crimestoppers' tips that McCracken County Sheriff's Detectives Jesse Riddle and Matt Carter got around to checking them out and made it over to the Leach residence. The tipster predicted that they would need to go to the back door, because "they won't answer the front door." Riddle had been at this address once before on a domestic violence call. Because Riddle did not testify at the suppression hearing there was no testimony as to how much time had passed since Riddle was at the home.

From the street Carter and Riddle could readily see the front door. It was completely unobstructed and to make access easier, a ramp with a handrail led to

the front porch. Detective Carter admitted that he and Riddle could have first knocked on the front door to see if James or Karen Leach would answer. If the tipster's prediction was right, this would have taken two or three minutes. They chose to skip the front and go straight to the back door based on the anonymous prediction and hearsay evidence of Riddle's single experience.

The back door of the Leach home could not be seen from the front of the property, from either side or from the back. There was a driveway on one side of the house and, on April 22, 2005, it was parked up with vehicles, incldng a truck, some cars and a trailer. All along the outer edge of the driveway there grew a tall, thick hedge of bushes and trees. See photos in appendix. On the other side of the house was a similar barrier of bushy vegetation, augmented by a shed which extended behind the house thereby obscuring the back entry from the neighbors' view. See photos in appendix.

Behind the Leach home was an open field. Still all along the back property line there was a thick row of tall trees and bushes shielding the property from the back. In addition, inside this tree line was a large garage that totally blocked a view of the back door.

To sum up, the entire back yard of James and Karen Leach was enclosed on all sides, on one side by the house, and on the other three sides by trees, bushes and permanent outbuildings. The back door area within the back yard was completely obscured from view by all neighbors and passers-by.

On April 22, 2005, to reach the back door the detectives threaded their way along the driveway through the closely parked vehicles and made a 90 degree left turn behind the house. It was a spring day the main door was open while the screen door remained closed. Detective Carter smelled marijuana

coming from inside. The detectives knocked and from inside James Leach said "come in." Carter called to James that they were drug detectives with the Sheriff's Department. Carter told him they had received information of illegal meth activity and asked James if anything like that was going on at 2215 Hovecamp. James Leach said no.

The detectives told Mr. Leach they smelled his marijuana and James – by now outside – admitted there was marijuana in the house as well as weapons. The detectives handcuffed him, got him to consent to let them enter and search the house, roused Karen Leach from her bedroom, proceeded through the house, found the marijuana and hand guns, detained both James and Karen Leach for three to three and a half hours while they got a warrant, found more marijuana and paraphernalia, and arrested both Karen and James. No trace of methamphetamine or cocaine was found. Just marijuana.

B. Proceedings Below

Both Mr. and Mrs. Leach entered conditional guilty pleas and moved to suppress the evidence found in their house on the ground that the police officers had been illegally on their property when they approached the back door. The McCracken County Circuit Court denied their motion. *Id.* at A-27.

The Kentucky Court of Appeals reversed in an unpublished decision. The court noted that, under Kentucky precedent, "a police officer in the furtherance of a legitimate criminal investigation can enter those parts of a private residential property which are impliedly open to public use." *Id.* at A-7 (quoting *Cloar v. Commonwealth*, 679 S.W.2d 827, 831 (Ky. App. 1984)). Thus, the court explained, the pertinent

question was whether the back door was impliedly open to the public.

The court answered the question in the negative. It pointed out that the back door was concealed from the public roadway and noted that it was being used to grow marijuana, a use not meant to be seen by passersby. It stated that the photos in the record showed that there was no pathway and that the back yard was not otherwise impliedly open to the public.

The court recognized that there could be circumstances in which a back door could be impliedly open to the public. It provided the examples of when the front door is inaccessible or when there is no response to attempts to contact inhabitants by the front door, and it distinguished cases cited by Petitioner by stating that those cases said that an officer may go to the back door only if the front door is inaccessible or the officer knocked on it first and got no response. It pointed out that neither of those instances existed here.

The court noted that, in this case, the only evidence suggesting that the back door was impliedly open to the public was "an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that 'everyone' used the back door to enter and exit." It pointed out that there was no testimony that the people who used the back door on Deputy Riddle's previous visit included the public, and, indeed, that because the previous visit had involved a domestic disturbance, it was logical to assume that only family members had been involved. The court concluded that it could not in good conscience deem a back door to be impliedly open to public use based on an uncorroborated anonymous tip and the single previous

experience of one of the officers." Accordingly, it held that the officers had engaged in a warrantless search and that the evidence found was inadmissible.

Kentucky filed a motion for discretionary review by the Kentucky Supreme Court, which was denied.

RESPONDENT OBJECTS TO THE QUESTION PRESENTED.

James and Karen Leach specifically object to the question presented in the Commonwealth's Petition, i.e., "is it reasonable to initiate a 'knock and talk' investigation at a back door used as the main public entrance of a residence?" The Leachs' back door was not used as the main public entrance of their residence, and the Kentucky Court of Appeals ruled that it was not impliedly open to the public.

The Kentucky Court of Appeals properly focused on the use of the property as well as the four factors set out in U.S. v. Dunn, 480 U.S. 294, 301 (1987). The court reviewed all the evidence and stated that even a cursory glance at the photos "establish that there was no pathway and the back yard of the property was not otherwise impliedly open to the public.... On the other hand, a clear, unobstructed walk leads to the front door."

The only question presented by this case, was and is whether or not the Leachs' back door area was impliedly open to public use, a purely factual question, and not a proper question for our nation's highest Court. The Kentucky Court of Appeals properly found the facts, and applied the correct law, which is not in conflict.

REASONS FOR DENYING THE WRIT

A. The Purported Conflict Does Not Exist.

Petitioner's primary argument for certiorari is that there is conflicting caselaw over whether police officers must try the front door of a house before attempting to contact the resident through another entry or whether they may approach any entry generally open to the public. But this purported conflict is illusory. Not a single case cited by Petitioner states that police must always approach the front door before going to the back.

1. With regard to the federal cases cited by Petitioner, Petitioner is correct that *United States v. James*, 40 F.3d 850 (7th Cir. 1994), *Alvarez v. Montgomery County*, 147 F.3d 354 (4th Cir. 1998), *United States v. Freeman*, 426 F.2d 1351 (9th Cir. 1970), and *United States v. Reed*, 733 F.2d 492 (8th Cir. 1994), allow an officer, under certain circumstances, to approach the back of a building without first approaching the front.

Petitioner is also correct that *United States v. Daoust*, 916 F.2d 757 (1st Cir. 1990), *United States v. Raines*, 243 F.3d 419 (8th Cir. 2001), *United States v. Hammett*, 236 F.3d 1054 (9th Cir. 2001), and *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), allow officers to move away from the front door (under at least some circumstances) if the front door is inaccessible or goes unanswered.

Petitioner errs, however, in claiming that "[t]he implication from [this second category of] cases is clearly that the police must approach the front door first before attempting to contact the resident somewhere else on the premises." Pet. at 21. None of these four

cases states that officers must always knock on an accessible front door; they just address situations either where the officers *did* knock on the front door or where the front door was inaccessible.

For example, in *Daoust*, in which the front door was five feet above the ground with no steps, the First Circuit held that it was not illegal for officers who were engaged in a legitimate attempt to interview a person to go around the back of the house when the front door was inaccessible. 916 F.2d at 758. In doing so, the *Daoust* court "did not... imply that police officers seeking to interview a person are always required to knock on the front door of a residence before they may approach any other public means of access to the dwelling." *James*, 40 F.3d 862 n.4. The First Circuit did not speak to circumstances in which the front door was accessible because it was not faced with such facts. Similarly, in *Raines*, *Hammett*, and *Marasco*, the courts were not presented with circumstances in which officers bypassed accessible front doors, and the courts did not say what they would have concluded under such circumstances.

2. Petitioner's claim that there is a conflict among state cases suffers from the same problem: Although *State v. Lyons*, 307 S.E.2d 285 (Ga. App. 1983), *Miller v. State*, 27 S.W.3d 427 (Ark. 2000), *Gonzalez v. State*, 588 S.W.2d 355 (Tex. Crim. App. 1979), *City of Eugene v. Silva*, 108 P.3d 23 (Or. App. 2005), and *State v. Fisher*, 154 P.3d 455 (Kan. 2007), all allow officers to move away from the front door, under at least some circumstances, if it goes unanswered, none of them states, as Petitioner claims, that the police must *always* "approach the front door first before attempting to locate the occupant somewhere else on the premises." Pet. at 23. Indeed, some of these cases state rules

that would allow the police sometimes to knock on the back door without first approaching the front. *See, e.g.*, *City of Eugene*, 108 P.3d at 107 (allowing entry to backyard if homeowner has "explicitly or implicitly invited entry").

3. The cases cited by Petitioner that *do* consider whether officers can approach a back door without first knocking on an accessible front door tend to state legal rules that are similar to each other and to the rule applied by the court below. Although they do not always use the same terminology, these cases, like the court below, generally consider whether the back door was open to the public. *Compare* Pet. App. A-7 (allowing entrance to parts of property that are impliedly open) *with, e.g.*, *James*, 40 F.2d at 862 (allowing entrance to back door that is readily accessible to the general public if officers reasonably believe it is a principal means of access to the dwelling); *Freeman*, 426 U.S. at 1353 (allowing entrance to area "obviously open to use by any person having a legitimate reason for doing so"); *Trimble v. State*, 842 N.E.2d 798, 802 (Ind. 2006) (allowing entrance to places visitors would be expected to go); *see also* Pet. at 25-27 (seeming to equate "accessible to the public," and "common access route," with "impliedly open to the public").[1]

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[1]The only case in the petition addressing whether an officer can approach the back door without first knocking on the front that does not explicitly state a similar standard is *Alvarez*, where the Fourth Circuit found that it was reasonable for officers to proceed directly to the back yard when there was a sign in the driveway saying "party in back" with an arrow. 147 F.3d at 357-58. That decision does not conflict with the decision below.

In short, Petitioner has not identified a conflict in the caselaw, but simply the truism that courts apply different legal rules to different factual scenarios. When faced with cases in which officers knocked on front doors before proceeding to other parts of the property, courts generally apply rules pertaining specifically to whether officers can move away from front doors. When officers did not knock on front doors before entering others part of property, however, the question of whether officers can move away from front doors is not presented. Thus, when faced with those cases, courts instead apply rules pertaining to when in general officers can enter other parts of the property. But a rule stating that an officer can move away from an unanswered front door and a rule stating that an officer can enter any part of the property that is impliedly open to public use do not conflict.

Indeed, the court below even explained how situations in which the front door is inaccessible or goes unanswered fit within its "impliedly open" rule. According to the Kentucky appellate court, those two situations are "circumstances where members of the public could think that a back door would be open to the public." Pet. App. A-9. In other words, these situations are specific *examples* of what might make a back yard impliedly open. Neither of these examples is present in this case, however, nor were there other circumstances that would have made the back yard impliedly open to the public.

B. Even if It Did Exist, the Conflict Would Not Be Implicated By This Case.

Even if there were a conflict over whether police officers must always try the front door before going around back or whether they can approach any entry

open to the public, the resolution of that conflict would not affect the outcome of this case. Although Petitioner claims that "the Kentucky Court of Appeals relied heavily on the fact that Detective Carter did not go to the front door first before proceeding to the back door," Pet. 29, the court below did *not* adopt a bright-line rule requiring officers to go to the front door first. Rather, it examined whether the back door was open to public use, concluding that it was not. Pet. App. A-7.

Accordingly, if this Court decided that officers always have to go to the front door first, the decision below would have to be affirmed because Detective Carter and Deputy Riddle went directly to the back door. But if the Court decided that officers can use any entry open to the public, the decision below would also have to be affirmed, unless the Court disagreed with the lower court's fact-based conclusion that the Leaches' back yard was not impliedly open to public use. Put differently, although Petitioner claims that "certiorari should be granted in order to clarify whether . . . the Fourth Amendment permits the police to approach any entrance of a residence generally accessible to visitors," Pet. 14, that clarification, on its own, would not determine the outcome of this case.

Thus, in the end, Petitioner is just asking this Court to review the lower court's case-specific determination that the Leaches' back yard was not impliedly open to the public. *Compare* Pet. 30 (claiming that "the facts of this case show that the officers restricted their movements to places open to visitors") *with* Pet. App. A-8 (concluding that the back yard entered by the officers was not impliedly open); *compare also* Pet. i (claiming this case presents the question of whether a police officer can approach "the main public entrance of a residence") *with* Pet. App. A-9 (noting that "[t]here was no testimony that those who used the back door included the public"). The Leaches' back yard, however, was concealed from public view. A thick growth of trees and shrubs along with a parked truck and cars shielded it on one side; thick shrubs, trees, an air-conditioning unit and trailer shielded it from view from the other; and a line of trees and overgrowth of vegetation blocked the yard from view from the open field beyond it. The Leaches had a legitimate expectation of privacy in this enclosed back yard, and the lower court was correct in concluding that it was not impliedly open to public use.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

Photos of Leach home at 2215 West Hovecamp Road, Paducah, Kentucky.....A1 – A5